17 Suggestions for Legislative Reform of the Endangered Species Act

by
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1. The ESA should define "harm" to require proof that an activity will actually kill or injure a listed species.

[**Comment:** Section 9 of the Endangered Species Act prohibits the "taking" of any endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B). However, the Act allows such "taking," when authorized, if such "taking" is incidental to, and not the purpose of, carrying out an otherwise lawful activity. *See* 16 U.S.C. § 1539(a)(1)(B). The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm" was interpreted by regulation to mean:

> an act which *actually* kills or injures wildlife. Such act may include significant habitat modification or degradation where it *actually* kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.
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> 50 C.F.R. § 17.3 (emphasis added).

This interpretation was upheld by the U.S. Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), but the U.S. Fish and Wildlife has attempted to "read out" the requirement of *actual* injury in its day-to-day implementation of the Act. For example, in *Arizona Cattle Growers Association v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir Dec 2001), the Service argued that it could prohibit grazing on federal land without any proof of harm to any species. Although this argument was rejected by the court, the Service has not embraced the court decision. Therefore, the Act should define "harm" to require proof that an activity will actually kill or injure a listed species.]

2. The ESA should require that private land not be included in "critical habitat" if the management of public lands is sufficient for the conservation of a listed species.

[**Comment:** Even when public lands alone will provide sufficient habitat to conserve a threatened or endangered species, the government designates vast amounts of private property as "critical habitat"-- primarily because it has little incentive not to. The Alameda whipsnake is a perfect example. When the whipsnake was listed as a threatened species, the U.S. Fish and Wildlife Service reported that only 20% of the snake's known habitat was on private land and that this land was not essential to the conservation of the species. 65 Fed. Reg. 58935. However, when it designated "critical habitat," pursuant to court order, the Service included not only occupied habitat but "potential" habitat that did not contain the physical or biological features essential to the conservation of the species. This resulted in the inclusion of 248,270 acres of private land, or 61% of the total "critical habitat" area of 406,598 acres. Id. at 58937. The "critical habitat" for the Alameda whipsnake has been challenged in court as overly broad and similar suits have been brought challenging "critical habitat" of the western snowy plover, the California red-legged frog, the California coastal gnatcatcher, and various species of fairy shrimp. Nineteen ESU's (or "Evolutionarily Significant Units") of Pacific salmon have also been challenged as too broad.

This practice of regulating private property that is not essential to the conservation of the species imposes unfair and unnecessary regulatory burdens on private citizens. More than 36 million acres or 36% of the area of the State of California has already been designated "critical habitat," and more will follow. Therefore, the Act should require that private land not be included in "critical habitat" if the management of public lands is sufficient for the conservation of a listed species.]

3. The ESA should require that where implementation of the Act interferes with an existing federal contract the federal government should either compensate for the losses to private citizens or find a way to meet its contractual obligation.

[**Comment:** To protect listed salmon and sucker fish in California and Oregon, in 2001 the Bureau of Reclamation breached its decades-old contract to provide irrigation water to Klamath farmers from the Klamath Water Project that was built to provide such water. This resulted in a drastic loss of jobs and livelihoods when local farmers were unable to water their crops on farms that had been productive for generations. The harsh impacts on the local community and the ensuing demonstrations (not to mention the tense standoff with federal authorities at the main pumping station) was widely publicized. A suit against the federal government for up to $1 billion in damages is now pending in federal court. *Klamath Irrigation District v. U.S.* (Fed Claims, No. 01-591 L) Federal agencies should not be required to break their contractual obligations (or violate other laws) to comply with the ESA. Therefore, the Act should require that where implementation of the Act interferes with an existing federal contract the federal government should either compensate for the losses to private citizens or find a way to meet its contractual obligation.]

4. The ESA should (1) expressly limit "reasonable and prudent alternatives" to those options that meet the basic objective of the proposed project and (2) define the term "reasonable and prudent" to mean "economically feasible" for the permit applicant.

[**Comment:** Section 7 of the Act, 16 U.S.C. § 1536, allows the "taking" of a threatened or endangered species if "reasonable and prudent alternatives or measures" are adopted to mitigate the impact of a federally approved project. This means a project can go forward with alterations designed to minimize impacts on protected species. However, the terms "reasonable and prudent alternatives or measures" are not defined in the Act. As a result, federal agencies often impose "alternatives" or "measures" that simply nullify the proposed project without rejecting it outright as the law requires. For example, when the Bureau of Reclamation considered "reasonable and prudent alternatives" for the Klamath Irrigation Project, the Bureau did not consider alternative ways of providing irrigation water to the Klamath farmers, the very purpose of the project, but rather coopted the project for the sole purpose of providing water for protected fish. Likewise, federal agencies often require "reasonable and prudent measures" that are not economically feasible for the project applicant, such as the use of expensive fish screens by a small water irrigation district. Such "alternatives" or "measures" may be environmentally "prudent," but they are not "reasonable" if they cannot be carried out consistent with the purpose of the project. If the project, as proposed, cannot be made sufficiently protective of threatened and endangered species by the application of "reasonable and prudent alternatives or measures," then section 7 requires that the agency deny approval of the project. But the agency may not redefine the project under the guise of "reasonable and prudent alternatives or measures." The clear intent of section 7 is to facilitate otherwise legal projects that would not jeopardize a species with sensible modifications. Therefore, the Act should (1) expressly limit "reasonable and prudent alternatives" to those options that meet the basic objective of the proposed project and (2) define the term "reasonable and prudent" to mean "economically feasible" for the project applicant.]

5. The ESA should require the listing of species, and the designation of Critical Habitat, based only on *substantial* evidence in the record as a whole.

[**Comment:** The Act currently requires the listing of threatened or endangered species, and the designation of "critical habitat," based only on the "best available" scientific evidence. See 16 U.S.C. § 1533. However, both the implementing agencies and the courts have interpreted "best available" to mean any evidence whatsoever. This has resulted in unnecessary listings and overly broad "critical habitat" designations. For example, in a July 15, 1998, study entitled *Babbitt's Big Mistake*, the National Wilderness Institute documented the following.

> Historically data error has been the most common actual reason for a species to be removed from the endangered species list. Species officially removed because of data error include: the Mexican duck, Santa Barbara song sparrow, Pine Barrens tree frog, Indian flap-shelled turtle, Bahama swallowtail butterfly, purple-spined hedgehog cactus, Tumamock globeberry, spineless hedgehog cactus, McKittrick pennyroyal and cuneate bidens. While officially termed `recovered', the Rydberg milk-vetch and three birds species from Palau owe their delisting to data error (see

> Delisted Species Wrongly Termed Recovered by FWS, p. 16). Many other currently listed species have been determined to by substantially more numerous and to occupy a much larger habitat than believed at the time of listing (see Environment International, Conservation Under the Endangered Species Act, 1997).
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> Publications, Studies, Reports, Legislative Briefs at http://www.nwi.org

Likewise, when the U.S. Fish and Wildlife Service adopted it's final rule designating "critical habitat" for the Alameda whipsnake the Service admitted it included nonessential habitat in the designation because of a lack of better, but easily obtainable scientific data:

> We recognize that not all parcels within the proposed critical habitat designation will contain the primary constituent elements needed by the whipsnake. Given the short period of time in which we were required to complete this proposed rule, and the lack of fine scale mapping data, we were unable to map critical habitat in sufficient detail to exclude such areas.
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> 65 Fed. Reg. at 58,944.

Therefore, to avoid data errors that result in unnecessary listings and overly broad "critical habitat" designations, such determinations should be based only on *substantial* evidence in the record as a whole. (Note: A reasonable definition of "substantial evidence in the record as a whole" would require, at a minimum, that the evidence be peer reviewed and include more than merely some evidence that supports the decision. It would, instead, require the agency to take into account whatever in the record fairly detracts from the weight of the evidence including any contradictory evidence or evidence from which conflicting inferences could be drawn.)]

6. The ESA should require formal, independent "peer review" of scientific and economic information and the result of such review should be made a part of the public record.

[**Comment:** Even though the Act requires that listing, "critical habitat," and permit determinations must be based "solely on the best scientific and commercial data available," the Act does not require "peer review" of such data. Instead, the government uses peer review on an informal, ad hoc basis. This has proven inadequate as recent events in the Klamath area have shown. In 2001, the Biological Opinion for the Klamath Project concluded that any water diversions for irrigation purposes would jeopardize listed salmon and sucker fish, although numerous claims were made that the Biological Opinion ignored more reliable data that showed that water diversions would not jeopardize the fish. Based on this conclusion, the Bureau of Reclamation prohibited all water diversions from the Klamath Project to Klamath area farmers who depend on irrigation water from the project. A firestorm of protests followed calling on the Administration to take a closer look at the data for 2002. In response, the Administration subjected the data to "peer review" by the National Academy of Sciences. An expert scientific committee of that body subsequently determined that the 2001 Biological Opinion was faulty because the "best scientific and commercial data" showed that water diversions for irrigation would not jeopardize the listed fish.

Therefore, to minimize error, the Act should require formal, independent "peer review" of scientific and economic information and the result of such review should be made a part of the public record.]

7. The ESA should require that the economic analysis associated with the designation of "critical habitat" take into consideration the cumulative economic impacts of the listing of the species.

[**Comment:** The Act requires the government to designate "critical habitat" at the time of listing a species as threatened or endangered. 16 U.S.C. § 1533(a)(3). The habitat designation must be based on the best scientific data available, but--unlike the listing of a species--only "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). According to the House Report on the Endangered Species Act Amendments of 1982:

> Whether a species has declined sufficiently to justify listing is a biological, not an economic, question. For this reason, the Committee eliminated all economic considerations from the species listing process. Desirous to restrict the Secretary's decision on species listing to biology alone, *the Committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests. For this reason, the Committee elected to leave critical habitat as an integral part of the listing process . . . .*
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> H.R. Rep. No. 567, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2812 (emphasis added).

In its economic analyses of "critical habitat," the U.S. Fish and Wildlife Service has only considered the incremental economic impacts on the regulated community that derive from the designation itself. In virtually every case, the Service has concluded that these impacts are either not significant or nonexistent. Thus, instead of providing the "counter-point" that Congress intended, the Service has reduced the economic analysis to a meaningless exercise. However, in a case called *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir, 2001), a federal court of appeals rejected the incremental impacts approach the Service employed and concluded a meaningful analysis must also include the economic impacts on land use caused by the listing. Unfortunately, this precedent is not binding in other circuits. Therefore, the Act should require that the economic analysis associated with the designation of "critical habitat" take into consideration the cumulative economic impacts of the listing of the species.]

8. The ESA should require specific findings that areas designated as "critical habitat" are "essential" (i.e. *absolutely necessary)* for the conservation of the species.

[**Comment:** The Act defines "critical habitat" to include *only* those areas actually occupied by the species that are *essential* to the conservation of the species as well as those areas that are

unoccupied by the species, at the time of listing, that the Secretary determines are *essential* for the conservation of the species. 16 U.S.C. § 1532(5). However, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service have virtually never made such a finding. Rather, they tend to rely on the species' historical range and routinely include potential or merely possible habitat areas in the "critical habitat" designation. In effect, they take the term "essential" to mean nothing more than "desirable." *See* almost any "critical habitat" designation, including the designations for the Alameda whipsnake, the California red-legged frog, the California coastal gnatcatcher, and the various populations of Pacific salmon. This failure of the agencies to follow the statutory criteria undermines the intent of the Act, to limit the scope of "critical habitat," and imposes unnecessary burdens on the regulated community. Therefore, the Act should require specific findings that areas designated as "critical habitat" are "essential" (i.e. *absolutely necessary)* for the conservation of the species.]

9. The ESA should require the designation of "critical habitat" only when a Recovery Plan is developed.

[**Comment:** The ESA creates a dilemma for federal regulators and an unnecessary problem for landowners. As noted, the Act requires the government to designate "critical habitat" at the time of listing a species as threatened or endangered. 16 U.S.C. § 1533(a)(3). By definition, "critical habitat" includes only those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A). The term "conservation" is defined as "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures ... are no longer necessary." 16 U.S.C. § 1532(3). In other words, conservation is the process by which the species is recovered. Taken together, these statutory provisions authorize the government to designate as "critical habitat" just those areas that are essential to the recovery of the species. The problem is that at the time of listing, when "critical habitat" is required to be designated, the government has not yet ascertained what is necessary, therefore essential, for recovery. Although the ESA requires the development of a recovery plan, 16 U.S.C. § 1533(f), where appropriate, for each species, this cannot be done without extensive research. Research that is unavailable at the time of listing. The dilemma for federal regulators, and the problem for landowners, lies in the fact that the government cannot know what areas are essential for the recovery of the species, and should be designated "critical habitat," until a recovery plan is produced, but which cannot be produced at the time when "critical habitat" must be designated. Therefore, to "hedge its bet," the government invariably overstates "critical habitat" to include not only "essential," but also "potential" or even "possible" habitat. This subjects an undue amount of private land to federal control and is contrary to the intent of Congress. Therefore, the ESA should require the designation of "critical habitat" only when a Recovery Plan is developed.]

10. The ESA should define "adverse modification" to include only those changes which are likely to result in actual, imminent harm to a listed species.

[**Comment:** The designation of "critical habitat" has major repercussions for private landowners, the States and the Nation. By way of example, "critical habitat" has been designated for only 10% of California's more than 290 federally-listed threatened and endangered species, but those habitat designations include nearly 40% of the area of the State. By the time "critical habitat" is

designated for all these species, the State of California will have been blanketed many times over. "Critical habitat" for a single species, like the California red-legged frog, can include millions of acres.

Under section 7 of the ESA, federal agencies must ensure that any activities they authorize, fund, or carry out are not likely to "result in the destruction or adverse modification" of "critical habitat." 16 U.S.C. § 1536(a)(2). The term "adverse modification" is not defined by the Act and is subject to varying interpretations. And although federal regulations require such modification to be "substantial," even small changes have been challenged by environmental litigants. As a result, the use of land, public or private, that is designated "critical habitat" can be severely limited, or prohibited altogether without affording significant protections to listed species. Congress tried to avoid the onerous impacts of "critical habitat"--when it amended the ESA in 1978--by limiting the scope of the designation to "essential" habitat areas. However, federal regulators continue to designate overbroad "critical habitat" areas while environmental litigants argue that "adverse modification" should preclude even minor changes to the land. Therefore, the ESA should define "adverse modification" to include only those changes which are likely to result in actual, imminent harm to a listed species.]

11. The ESA should exclude "distinct population segment" from the definition of "species."

[**Comment:** The Act defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. 1532(16). The term "distinct population segment" has no definite meaning and has allowed the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to expand or contract a regulated population by arbitrarily drawing either a large circle or a small circle around the target species. This has resulted in inconsistent and arbitrary designations of "distinct population segments" that have no relation to generally accepted biological standards. For example, rather than designating genetically identical Pacific Coast salmon as one species, the National Marine Fisheries Service divided them up into separate geographic groups based on a novel definition of distinct population segments called "Evolutionarily Significant Units" or "ESU's." ESU's can be as small as a specific stream or as large as an entire watershed. In contrast to the salmon, however, the agency decided that Puget Sound orcas did not constitute a population segment distinct from their cousins in Alaskan waters.

In effect, these agencies are taking the broad language of the Act and inventing their own biology that is both uncertain and scientifically unjustified. Therefore, the Act should exclude "distinct population segment" from the definition of "species."]

12. The ESA should expand the definition of "permit or license applicant" to include those directly affected by an agency action.

[**Comment:** Under subsection 7(g), 16 U.S.C. § 1536(g), of the Act, a federal agency, the governor of a state in which an agency action will occur, or a permit or license applicant may apply to the Secretary of the Department of Interior for an exemption from the ESA. The Act defines a

"permit or license applicant" to mean "when used with respect to an action of a federal agency for which exemption is sought under section 1536 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action." 16 U.S.C. § 1532(12). Section 1536(a) prohibits a federal agency from authorizing, funding, or carrying out any action likely to jeopardize the continued existence of any endangered or threatened species or that would result in the destruction or adverse modification of habitat critical to such species. Unfortunately, this narrow definition of "permit or license applicant" prevents those directly affected by the agency action to seek an exemption from the Act. For example, when the Bureau of Reclamation prohibited all water diversions from the Klamath Project in 2001 for irrigation purposes, the farmers submitted an exemption request to the Secretary. But this request was summarily rejected because the farmers were deemed not to have standing. Although the farmers were the intended beneficiaries of the federal action--operation of the Klamath Project–they were not actual permit applicants as defined by the Act. Ironically, those most directly affected by the federal agency determination to prohibit water diversions from the Klamath Project, and for whom the project was designed, had no legal right to seek an exemption from the Act. Therefore, the Act should expand the definition of "permit or license applicant" to include those directly affected by an agency action.]

13. The ESA should require federal agencies to minimize the economic impacts on permit applicants, especially when alternatives or mitigation measures are imposed on a proposed project.

[**Comment:** Under the Act, federal agencies may impose "reasonable and prudent" alternatives or measures on a proposed activity to mitigate impacts on listed species. 16 U.S.C. § 1536(b)(4). But these agencies have no duty or incentive to minimize economic impacts on permit applicants although those impacts can be severe and may not be necessary for the protection of the species. Overzealous application of the ESA breeds resentment and distrust of the federal government. Therefore, to avoid unnecessary regulatory burdens, to encourage cooperation from the regulated community, and to deter waste of economic and natural resources, the Act should require federal agencies to minimize the economic impacts on permit applicants, especially when alternatives or mitigation measures are imposed on a proposed project.]

14. The ESA should specify that state and federal officials do not violate the Act when they issue regulations or permits for otherwise legal activities that may, incidentally, result in the "taking" of a listed species but are not issued for the purpose of "taking" such species.

[**Comment:** Lawsuits against local, state, and federal agencies are proliferating based on the premise that regulations or permits issued by these agencies either "take" (16 U.S.C. § 1538(a)(1)(B)) a listed species or constitute a "solicitation" (16 U.S.C. § 1538(g)) to "take" a listed species in violation of the Endangered Species Act. For example, in April, 2002, the Center for Biological Diversity filed suit against the Environmental Protection Agency claiming that the mere registration of certain pesticides by that agency violates the "take" provision of the ESA because those pesticides could be used to harm threatened and endangered species, notwithstanding the use of such pesticides in an unlawful manner is prohibited *Center for Biological Diversity v.*

Whitman (N.D. Ca. No. C02-1580CW). Similar suits have been brought around the country. See *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (finding state's commercial fishing regulations exacted a "taking" of the Northern Right Whale under the ESA); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (finding Forest Service's management of timber stands was a "taking" of the red-cockaded woodpecker in violation of the ESA); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (holding that the EPA's registration of pesticides containing strychnine violated the ESA); *Palila v. Hawaii Dep't of Land and Nat. Res.*, 639 F.2d 495 (9th Cir. 1981) (holding state's practice of maintaining feral goats and sheep in palila's habitat constituted a "taking" under the ESA); and *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170 (M.D. Fla. 1995) (holding that county's authorization of vehicular beach access during turtle mating season exacted a "taking" of the turtles in violation of the ESA).

None of the regulations or permits struck down in these cases were designed to harm listed species. Nor did they actually authorize the "taking" of a listed species in violation of the ESA. Rather, they were a legitimate exercise of agency power authorizing otherwise legal activities. In each case, the actual harm was caused by an act of another. Congress could not have intended to hold government officials civilly and criminally liable for the illegal acts of another. Under these precedents, the Department of Motor Vehicles could be found in violation of the Act because someone who has a drivers licence issued by that agency uses his car to harm a threatened or endangered species. In our society individuals are presumed to know the law. It is common knowledge that the receipt of a permit does not absolve one of the responsibility of obtaining other necessary authorizations. Likewise, regulations or permits that authorize otherwise legal conduct that could result in the incidental "taking" of a listed species should require the actor, and not the agency, to avoid violating the ESA. Therefore, the Act should specify that state and federal officials do not violate the Act when they issue regulations or permits for otherwise legal activities that may, incidentally, result in the "taking" of a listed species but are not issued for the purpose of "taking" such species.]

15. The ESA should provide a streamlined "incidental take permit" process, especially for small projects unlikely to have any significant impact on the listed species.

[**Comment:** The Act allows the "taking" of a listed species, by permit, if it is merely incidental to, and not for the purpose of, carrying out an otherwise lawful activity. *See* 16 U.S.C. § 1539(a)(1)(B). However, the cost of applying for a permit is high and often prohibitive for small landowners. For example, a permit application under section 10 of the Act requires the applicant to submit a conservation plan. Even the smallest conservation plan can exceed $50,000 in cost. This sum would far exceed the value of many projects that are likely to have no significant impacts on protected species. Consider the family in Humboldt County, California, that owns a small ranch in marbled murrelet territory. The family would like to cut a few trees on its property to augment its modest income. Although the protected birds do not nest in those trees, the family must first obtain an "incidental take permit" from the U.S. Fish and Wildlife Service. But the cost of the application is beyond the family's means and many times more than the value of the trees. Thus, the Act places heavy burdens on the regulated community without providing any meaningful protection to listed species. And although the U.S. Fish and Wildlife Service or the National

Marine Fisheries Service may provide some relief for small projects through their own regulations or practices, the Act itself makes no distinction between the level of detail required for an insignificant project like laying bricks for a backyard patio or a major project like the development of an entire subdivision. Therefore, the Act should provide a streamlined "incidental take permit" process, especially for small projects unlikely to have any significant impact on the listed species.]

16. The ESA should clarify that the permit provisions under section 10 and the consultation provisions under section 7 are mutually exclusive.

[**Comment:** The Act authorizes two separate means of obtaining federal authorization to "take" a protected species incidental to a lawful activity--sections 10 and 7. Section 10 allows private citizens to obtain an Incidental Take Permit by means of a costly and lengthy application, review, and permit process. 16 U.S.C. § 1539. Section 7 allows private citizens to obtain an Incidental Take Statement by means of a less formal, but often burdensome, consultation process. 16 U.S.C. § 1536. By their terms, section 10 *only* applies to projects that *do not* involve a federal agency whereas section 7 *only* applies to projects that *do* involve a federal agency. Both the Incidental Take Permit under section 10 and the Incidental Take Statement under section 7 protect the applicant from liability for the incidental "take" of a threatened or endangered species and each may require substantial mitigation of project impacts. But although these two sections are directed at different types of project applicants, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service claim that private project applicants who seek an Incidental Take Permit under section 10 are also subject to the requirements of section 7. See *Environmental Protection Information Center v. Pacific Lumber Co.*, 67 F. Supp. 2d. 1090 (N. D. Cal. 1999)(overruled on appeal at 257 F.3d 1071 (9th Cir. 2001)). Therefore, to avoid uncertain and duplicative permitting requirements, the Act should clarify that the permit provisions under section 10 and the consultation provisions under section 7 are mutually exclusive.]

17. The ESA should clarify that although private applicants have a duty to "minimize and mitigate" the effects of their conduct on listed species, they do not have a duty, like the government, to provide resources for the general conservation or recovery of the species.

[**Comment:** Section 10 of the Act requires a permit applicant to provide a "conservation plan" that includes the steps that will be taken to "minimize and mitigate" the impacts of any incidental "taking" that may result from the proposed project. 16 U.S.C. § 1539(a)(2). This conservation plan must also include "such other measures that the Secretary may require as being necessary or appropriate for the purposes of the plan." Id. Although the "purposes of the plan" clearly relate back to the requirement to "minimize and mitigate" the impacts of the incidental "taking," the U.S. Fish and Wildlife Service and the National Marine Fisheries Service have taken this provision as carte blanche to impose any and all measures these agencies desire. In addition to the required mitigation, these agencies typically mandate through the conservation plan that the applicant also pay fees or provide land for habitat enhancements that go way beyond the remedial needs of the project. In effect, these agencies distort the Act to push the cost of conservation and recovery onto the private citizen. Under the Act and other laws, the government itself, and not the applicant, has the responsibility to provide for the general conservation and recovery of threatened and

endangered species. "Mitigation" measures that exceed the impact of a project in type or extent violate the applicant's constitutional protections. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Therefore, to avoid government abuse, the Act should clarify that although private applicants have a duty to "minimize and mitigate" the effects of their conduct on listed species, they do not have a duty, like the government, to provide resources for the general conservation or recovery of the species.]

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